UT 07-3
Tax Type: Use Tax On Out-of-State Purchases Brought Into Illinois

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	**No. 00 ST 0000** **NTL: 00 0000000000000** **IBT: 0000-0000**
v.	
JOHN DOE, **Taxpayer**	**Kenneth J. Galvin** **Administrative Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John Doe, appearing *pro se*; Mr. Marc Muchin, Special Assistant Attorney General, on behalf of the Department of Revenue of the State of Illinois.

Synopsis:

On May 22, 2006, the Illinois Department of Revenue (hereinafter the "Department") issued a Notice of Tax Liability ("NTL") for Motor Vehicle Use Tax to John Doe ("taxpayer"). The basis of the assessment was the Department's determination that the taxpayer had not paid use tax on a motor vehicle purchased in September, 2002. On June 14, 2006, taxpayer protested the assessment and requested a hearing. An evidentiary hearing was held on March 29, 2007, before Administrative Law Judge Mimi Brin, with the taxpayer testifying. Following a review of the testimony and the evidence submitted by the taxpayer and the Department, it is recommended that the Department's "Audit Correction and/or Determination of Tax Due," dated April 11, 2006, showing a use tax liability of $2,371 plus a late filing penalty and a late payment

penalty be finalized as issued. In support thereof, the following "Findings of Fact" and "Conclusions of Law" are made.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, is established by the admission into evidence of the SC-10-K, "Audit Correction and/or Determination of Tax Due," dated April 11, 2006, showing a use tax liability of $2,371 plus a late filing penalty and a late payment penalty. Tr. pp. 8-9; Dept. Ex. No. 1.
2. In September, 2002, John Doe purchased a 2002 BMW, Vehicle Identification No. 00000000000000000, from Motor Vehicles in Anywhere. The "ST-556," completed by the seller, shows that the vehicle was "exempt from tax" because it was "sold to an out-of-state-buyer." Mr. Doe did not pay Illinois retailers' occupation tax on the vehicle. Tr. pp. 14-15; Taxpayer's Ex. No. 2.
3. Mr. Doe drove the motor vehicle from the dealership to his house and kept the car in his driveway until a trucking company shipped it to Florida. Tr. pp. 22-23.
4. On October 2, 2002, Mr. Doe signed a notarized statement addressed to the Secretary of State of Florida giving power of attorney to his daughter to register his 2002 BMW in the State of Florida. A copy of Mr. Doe's driver's license is included on the notarized statement. The driver's license is issued from the State of Illinois, expiring September 14, 2003, listing Mr. Doe's address as, Anywhere, Illinois. Tr. pp. 15-16; Taxpayer's Ex. No. 3.
5. On October 14, 2002, John Doe, through power of attorney, completed a "State of Florida Application for Vehicle/Vessel Certificate of Title and/or Registration" for a

2002 BMW with vehicle identification number 00000000000000000, purchased September 26, 2002. Tr. pp. 12-13; Taxpayer's Ex. No. 1.

Conclusions of Law:

Under the Use Tax Act ("UTA") (35 ILCS 105/1 *et seq*.), Illinois imposes a tax upon the privilege of using in Illinois tangible personal property purchased at retail from a retailer. 35 ILCS 105/3. The use tax is a corollary to the retailers' occupation tax ("ROT") which is a tax on persons engaged in the business of selling at retail tangible personal property. 35 ILCS 120/2. The UTA was passed to complement and prevent evasion of the Retailers' Occupation Tax Act. Needle Co. v. Department of Revenue, 45 Ill. 2d 484 (1970).

The use tax is imposed at the same rate as the ROT. The rate of the use tax after December 31, 1989, is 6.25% of the selling price of the tangible personal property involved. 35 ILCS 105/3-10; 120/2-10. The retailer's failure to collect tax from the purchaser does not prevent the Department from collecting the tax directly from the purchaser, whether the retailer's liability to remit the tax is to remit it in the form of retailers' occupation tax or use tax. "If the user purchases the tangible personal property at retail from a retailer, but does not pay the use tax to such retailer, the purchaser shall pay the use tax directly to the Department." 86 Ill. Adm. Code § 150.130.

The facts in the instant case are not in dispute. In September, 2002, John Doe purchased a 2002 BMW, Vehicle Identification No. 00000000000000000, from Motor Vehicles in Anywhere. The "ST-556," completed by the seller, shows that the vehicle was "exempt from tax" because it was "sold to an out-of-state- buyer." Mr. Doe did not pay Illinois retailers' occupation tax on the sale. Tr. pp. 14-15;Taxpayer's Ex. No. 2.

Mr. Doe testified that he was misled by the car dealer who, according to Mr. Doe, advised him that he should pay use tax in Florida because he was going to register the car there. Mr. Doe did not have a Florida driver's license at the time of the purchase. Tr. p. 18.

Mr. Doe testified that when he purchased the motor vehicle, he was actually a resident of Illinois and that the dealership should have collected ROT from him, because he had a valid Illinois driver's license at the time of purchase. Tr. pp. 18-20. Mr. Doe stated that he filed State of Illinois income tax returns and owned a business in Illinois in 2002. Tr. p. 20. On October 2, 2002, Mr. Doe signed a notarized statement addressed to the Secretary of State of Florida giving power of attorney to his daughter to register his 2002 BMW in the State of Florida. A copy of Mr. Doe's driver's license is included on the notarized statement. The driver's license is issued from the State of Illinois, expiring September 14, 2003, and listing Mr. Doe's address as Anywhere. Illinois. Tr. pp. 15-16; Taxpayer's Ex. No. 3. The Illinois Vehicle Code states that "[E]very natural person who resides in this State shall be deemed a resident of this State." 625 ILCS 5/1-173. The evidence and testimony clearly show that Mr. Doe was a resident of Illinois when he purchased the motor vehicle. The vehicle was not exempt from tax because it was not sold to an "out-of- state buyer" and retailers' occupation tax should have been collected by the dealer on the sale.

Mr. Doe testified that he moved to the State of Florida in November of 2002 and moved back to Illinois in July, 2003. Tr. pp. 20-21. Mr. Doe testified that when he purchased the motor vehicle, he drove it from the dealership to his house. He kept the car in his driveway until a truck picked it up to transport it to Florida. On October 14, 2002,

John Doe, through power of attorney given to his daughter, completed a "State of Florida Application for Vehicle/Vessel Certificate of Title and/or Registration" for a 2002 BMW with vehicle identification number 00000000000000000, purchased September 26, 2002. Tr. pp. 12-13; Taxpayer's Ex. No. 1. When the car was registered in Florida, the odometer recorded 58 miles. Tr. pp. 22-23; Taxpayer's Ex. No. 1.

To begin the determination of whether use tax was properly assessed in this case, it must first be determined whether the taxpayer used the vehicle purchased in Illinois as the term "use" is defined in the UTA. Section 2 of the UTA (35 ILCS 105/2) defines "use" broadly as "the exercise by any person of any right or power over tangible personal property incident to the ownership of that property…". Mr. Doe testified that he drove the motor vehicle from the dealership to his house and kept the car in his driveway until a trucking company shipped it to Florida. Tr. pp. 22-23. Each of these acts, including driving the vehicle in Illinois and storing it in his driveway in Illinois, is clear indicia of the exercise of right or power over tangible personal property incident to ownership, constituting a taxable "use" under the UTA. The use tax is not a tax which arises out of the use or operation of tangible personal property, but rather it is a tax placed upon the exercise of powers or rights incident to ownership." Time, Inc. v. Dept. of Revenue, 11 Ill. App. 3d 282 (1st Dist. 1973). Mr. Doe's movement and storage of the vehicle fits exactly into the statutory definition of "use" which triggers the application of the use tax.

Additionally, Section 4 of the UTA (35 ILCS 105/4) provides that "[E]vidence that tangible personal property was sold by any person for delivery to a person residing … in this State shall be *prima facie* evidence that such tangible personal property was sold for use in this State." Accordingly, Mr. Doe's testimony that that he resided in

Illinois at the time of the delivery of the motor vehicle is *prima facie* evidence that the property was sold for use in Illinois. I conclude that use tax was properly assessed by the Department in this case.

The SC-10-K, Audit Correction and/or Determination of Tax Due" issued by the Department on April 11, 2007, is *prima facie* evidence of the correct amount of tax due. 35 ILCS 105/12 incorporating 35 ILCS 120/4. The Department's *prima faci*e case can be overcome upon the taxpayer's production of "competent evidence" identified with its books and records, showing that the Department's determination is incorrect. Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968). I conclude that taxpayer has failed to overcome the *prima facie* correctness of the SC-10-K.

Mr. Doe questioned the statute of limitations in Illinois for the collection of the use tax. Tr. pp. 23-24. In this case, no ST-556 was filed by the dealer. When no return is filed, the Use Tax Act provides for a six year statute of limitations beginning when the tax is due. 35 ILCS 105/12. In this case, the tax was due in September, 2002, when the vehicle was purchased, and the Notice of Tax Liability was issued on May 22, 2006. Clearly, the Department was within the time limits proscribed by the Use Tax Act.

Mr. Doe testified that he paid use tax in Florida in October, 2002, on the purchase of the vehicle and that the statute of limitations for claiming a refund of taxes in Florida was 3 years. Mr. Doe questioned whether the payment of the Florida taxes could be credited against the Illinois tax. Tr. pp. 27-29; Taxpayer's Ex. No. 4. The Use Tax Act provides for several exemptions to prevent actual or likely multi-state taxation. In order to receive a credit for taxes paid in another state, the taxes would have to be "properly due and paid in the other state." 35 ILCS 105/3-55(d); 86 Ill. Adm. Code § 150-310

(a)(3). The taxes that Mr. Doe paid to Florida were not "properly due." The taxes were "properly due" to Illinois since Mr. Doe was a resident of Illinois when he purchased the vehicle. Accordingly, Mr. Doe is not entitled to a credit for the taxes he paid to Florida. Mr. Doe's case presents an unfortunate set of circumstances, for which there is no remedy available under the Illinois statutes.

Wherefore, for the reasons stated above, it is my recommendation that the Department's SC-10-K, "Audit Correction and/or Determination of Tax Due," dated April 11, 2006, showing a use tax liability of $2,371 plus a late filing penalty and a late payment penalty should be finalized as issued.

June 22, 2007

Kenneth J. Galvin
Administrative Law Judge